

DOCKET FILE COPY ORIGINAL

LAW OFFICES

KOTEEN & NAFTALIN, L.L.P.

1150 CONNECTICUT AVENUE
WASHINGTON, D.C. 20036-4104

BERNARD KOTEEN*
ALAN Y. NAFTALIN
ARTHUR B. GOODKIND
GEORGE Y. WHEELER
MARGOT SMILEY HUMPHREY
PETER M. CONNOLLY
CHARLES R. NAFTALIN
GREGORY C. STAPLE
R. EDWARD PRICE

* SENIOR COUNSEL

TELEPHONE
(202) 467-5700
TELECOPY
(202) 467-5915

February 23, 1998

RECEIVED

FEB 23 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

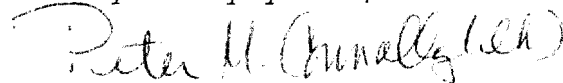
Re: C.C. Docket No. 95-116

Dear Ms. Salas:

Herewith transmitted, on behalf of United States Cellular Corporation ("USCC"), and in response to the Commission's public notice of January 22, 1998 (DA 98-111) are an original and four copies of USCC's comments on the petition filed by the Cellular Telephone Industry Association.

In the event that there are any questions concerning this matter, please communicate with this office.

Very truly yours,



Peter M. Connolly

Enclosures

cc (w/encl.): Janice Jamison, Esq.
ITS

No. of Copies rec'd
List ABCDE

0+4

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

FEB 23 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
) C.C. Docket 95-116
Telephone Number Portability)

COMMENTS OF UNITED STATES
CELLULAR CORPORATION

United States Cellular Corporation ("USCC") hereby files in support of the "Petition For Forbearance" filed by the Cellular Telecommunications Industry Association ("CTIA"). USCC owns and/or operates cellular systems in 43 MSA and 100 RSA markets. Accordingly, USCC has a considerable interest in any action the FCC may take with respect to forbearing from applying its "service provider" number portability requirements to wireless carriers.

I. CTIA Has made A Strong Case That The FCC
Should Forbear From Enforcing Its Service
Provider Number Portability Requirements

USCC supports CTIA's request that the FCC should forbear from enforcing its "service provider" number portability requirements with respect to wireless carriers until the initial five year buildout period for broadband PCS carriers has expired.

CTIA makes a strong case that the FCC's primary reason for imposing service provider number portability requirements on all CMRS carriers was its belief that the requirement would promote competition among cellular, broadband PCS and "covered SMR" providers.¹ If, however, the requested forbearance would better promote the FCC's pro-competitive purposes then the Commission's principal justification for the requirement would be eliminated.

While obviously PCS and SMR carriers will have to speak for themselves in this proceeding, it is telling that CTIA's PCS members supported the filing of the CTIA petition. If the majority of all PCS and CMRS commenters support the petition their comments will reflect a belief that forbearance is in their own best competitive interest. In such circumstances, the Commission ought to give it the most careful consideration.

As CTIA points out, the resources of CMRS carriers are obviously not infinite and money which must be spent, pursuant to FCC directive, on implementing service provider portability cannot be devoted to base station construction, customer service, or any other purposes to which carriers would devote resources if the free market dictated the expenditure.

¹ See First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8431- 8436 (1996)

As USCC and many other carriers have discussed, for wireless providers to implement service provider number portability, they will have to change their present method of verifying the identity and legitimacy of every wireless telephone in the county. In order to do this, the present wireless "Mobile Identification Number," the "MIN," will have to be split into two numbers, the MIN, which will remain to identify the customer's home system and the Mobile Directory Number ("MDN"), a new 10 digit number which will be the customer's permanent dialable telephone number regardless of his or her system. Making this change and implementing the system hardware and software upgrades which also will be necessary have proven to be very difficult to accomplish. As CTIA points out, considerable progress has been made, but, given the need for product development and necessary testing, evidently there is no chance that the transition can be completed by the present June, 1999 deadline, which is why CTIA has also sought an extension of that deadline until March, 2000.

The costs of compliance will be very considerable and CMRS carriers ought not to have to incur them unless the Commission ultimately determines, following the completion of at least the initial stage of PCS system construction, that competition actually does require mandated number portability for CMRS customers.

II. CTIA's Analysis Of Section 10 Of The Communications Act Is Correct

As CTIA notes, Section 10 of the Communications Act [47 U.S.C

§160] requires the FCC to forbear from:

"applying any regulation or any provision of this Act to a... class of telecommunications carriers or telecommunications services in any or some of... their geographic markets, if the Commission determines that--

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.²

Section 160(b) of the Communications Act provides that in making the "public interest" assessment required by sub-paragraph 3 above, the FCC must determine "whether forbearance will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."³

² 47 U.S.C. §160(a).

³ 47 U.S.C. §160(b).

Thus, in this context, all three prongs of the forbearance test are essentially the same competition-related test. In determining whether to enforce a given regulation the Commission should be guided by the underlying principle that those regulations which promote competition should be enforced, while those which retard it should be reviewed sceptically. In a competitive market, charges for a given service will be lower than they would be in a monopolistic market and firms will compete for customers, inter alia, by providing better service than their competitors. And Congress has provided, as noted above, that the "public interest" for this purpose is essentially synonymous with the promotion of competition. Thus, if CTIA is correct, as we believe it to be, that the proposed forbearance will indeed promote competition, then its petition should be granted.

III. The FCC Should, As A General Matter, Not
Impose Costly New Mandates, Such As
Number Portability, On CMRS Carriers On
Its Own Motion

In 1996, the FCC imposed number portability obligations on CMRS carriers not because it was required to do so by Section 251(b) of the Communications Act, as was the case with respect to the requirement that local exchange carriers provide service provider number portability, but rather because it believed that it

would serve the public interest to do so.⁴ As the statutory basis for its action, the FCC referred to general and open-ended supervisory grants of authority under the Communications Act.⁵

USCC did not then and does not now challenge the FCC's legal authority to require the provision of service provider number portability by CMRS carriers. However, we urge the Commission to reconsider its action, at least until PCS carriers have had their initial buildout period, in light of the totality of new and onerous requirements now being imposed on CMRS carriers by congressional and FCC action.

Wireless carriers are now being required, for example, to pay large "universal service" subsidies, which will only increase in size for the foreseeable future, to retrofit their systems to meet the expanding requirements of the Communications Assistance For Law Enforcement Act (CALEA), to implement "enhanced 911" capabilities, and to institute procedures to transmit calls to "ported" wireline telephone numbers by the end of 1998. Implementing those requirements will cost large sums of money with cost recovery usually very uncertain. And compliance with these rules will take

⁴ See First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd, at 8432-8433 (1996)

⁵ Ibid.

up considerable managerial time which could otherwise be spent building CMRS licensees' businesses.

In certain of those instances, for example, with respect to universal service payments, the FCC has acted pursuant to congressional direction through amendments of the Communications Act. In such cases, the fundamental public interest decision to proceed with a given course of action has been made by Congress and the FCC merely acts as an implementing agency.

But where, as in the case of CMRS service provider number portability, the FCC does not have to impose new regulatory and financial burdens on a given industry, and that industry is already having to deal with many new and costly regulations, it is the Commission's duty, we submit, to review new or even pending regulations critically and subject them to a searching cost/benefit analysis before they are put into effect.

Judged in that light, implementation of CMRS service provider number portability is a worse idea now than it was in 1996. We ask that the FCC reconsider this requirement at least until PCS systems have had their initial construction period and the CMRS industry has been able to acclimate itself to a new and far more regulated environment.

Conclusion

For the foregoing reasons USCC asks that the CTIA petition be granted.

Respectfully submitted,

UNITED STATES CELLULAR CORPORATION

By: Peter M. Connolly (sk)
Peter M. Connolly
Koteen & Naftalin
1150 Connecticut Ave., N.W.
Washington, D.C. 20036

February 23, 1998

Its Attorneys